STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2008AP2759-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL H. HANSON,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION,
ENTERED IN KENOSHA COUNTY CIRCUIT
COURT, THE HONORABLE
WILBUR W. WARREN, III, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication because this case involves established law and any factual disputes can be resolved from the parties' briefs. *See* Wis. Stat. §§ 809.22(2)(b), 809.23(1).

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE TO CONVICT DANIEL HANSON OF FLEEING UNDER WIS. STAT. § 346.04(3), WHICH IS NOT OVERRIDDEN BY THE FACT THAT HANSON CALLED 911 FOR DIRECTIONS TO A POLICE STATION WHILE FLEEING.

A. Introduction.

Daniel Hanson was convicted of fleeing a traffic officer, in violation of Wis. Stat. § 346.04(3), and of two counts of obstructing an officer, in violation of Wis. Stat. § 946.41(1) (28; A-Ap. at 485). His conviction stems from an incident in which he drove off while stopped for speeding.

He claims that there was insufficient evidence to convict him of fleeing because he was "attempting to drive to a police station" when he fled (Brief at 22). His claim fails because it is contradicted by the plain language of Wis. Stat. § 346.04(3), which prohibits fleeing "*any* traffic officer," not the police generally. When the evidence from Hanson's trial is considered in light of this plain language, it is clear that there was sufficient evidence to convict him.

B. Standard of review.

Though Hanson presents his claim as a sufficiency of the evidence claim, his claim really rests on the interpretation of Wis. Stat. § 346.04(3). He does not dispute the sufficiency of the evidence that he drove off during a traffic stop and endangered traffic. He instead claims that he could not have been found to have had the specific intent required to flee under Wis. Stat. § 346.04(3) because he was driving to a police station. He argues that "a conviction for Eluding an Officer under

Section 346.04(3), should not stand where a suspect calls 911 and tells police where they are going to stop their vehicle" (Brief at 25). He thus seeks a *per se* rule that his actions – driving from a traffic stop and calling 911 for directions to the police station – can never constitute fleeing under Wis. Stat. § 346.04(3). Whether Hanson's actions can constitute fleeing under Wis. Stat. § 346.04(3) is a question of statutory interpretation subject to this court's *de novo* review. *See State v. Oppermann*, 156 Wis. 2d 241, 243, 456 N.W.2d 625 (Ct. App. 1990).

C. Hanson's argument that he could not have fled because he was driving to a police station is at odds with the plain language of Wis. Stat. § 346.04(3)

Hanson's argument has rhetorical flair: how could he flee when he was driving to a police station? When the plain language of Wis. Stat. § 346.04(3) is considered, however, the answer is clear. Because the statute says so.

Wisconsin Stat. § 346.04(3) provides:

> No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude *any traffic officer* by willful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall the operator increase the speed of the operator's vehicle or extinguish the lights of the vehicle in an attempt to elude or flee.

Hanson's argument is at odds with this plain language. Hanson takes the position that the police is the police is the police, that it is not fleeing if a driver is trying to get from one officer to another. But Wis. Stat. § 346.04(3) proscribes fleeing from "*any* traffic officer," not police generally. It does not give a driver the option of taking matters in his own hands, driving off in search of a preferable or possibly more lenient officer.

It makes sense that Wis. Stat. § 346.04(3) would not allow for the type of self-help, and shopping-around for different officers, Hanson claims it does. The language of Wis. Stat. § 346.04(3) indicates that it has two objectives: (1) fostering cooperation with individual traffic officers and (2) avoiding unsafe driving. For both objectives, a driver's subjective motivation and destination are of absolutely no consequence.

The Wisconsin Supreme Court expressed similar concerns about fleeing as represented in Wis. Stat. § 346.04(3) in the Fourth Amendment case *State v. Young*, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 729. It held that a person who flees police is not seized – and that the exclusionary rule does not apply – until there is an actual seizure. *Id.* at ¶ 41. It rejected the general test that a person is seized "'if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Id.* at ¶ 3, *quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In support of the test it adopted, which the United States Supreme Court first set forth in *California v. Hodari D.*, 499 U.S. 621 (1991), it stated:

> First, by postponing the moment at which the protection of the exclusionary rule becomes available to an individual who flees from the police until there has been a seizure, *Hodari D.* encourages compliance with police orders, thereby obviating the need for police pursuits that pose risks to the public. *Id.* Instead of employing self-help remedies like flight, citizens should seek relief from unlawful police interference in the courts through use of the exclusionary rule and, if need be, civil rights suits.

Young, 294 Wis. 2d 1, ¶ 41.

The same considerations as the supreme court expressed in *Young* are at play here. Wisconsin Stat. § 346.04(3) advances the same objectives—compliance with police orders and avoidance of risky behavior. Additionally, drivers like Hanson have remedies available if problems occur during a traffic stop: calling 911,

seeking additional police presence, or bringing a civil action. Fleeing is not an option though, at least when a defendant cannot prove he acted in self-defense.

D. There was sufficient evidence to convict Hanson of fleeing under Wis. Stat. § 346.04(3).

With Hanson's statutory argument, so too goes Hanson's sufficiency of the evidence claim, for that is the only challenge Hanson makes to the sufficiency of the evidence. It is nonetheless worth noting that, when the evidence is considered in light of the plain language of Wis. Stat. § 346.04(3), it was clearly sufficient.

The state prosecuted Hanson for knowingly fleeing a traffic officer after having "received a visual or audible signal from a marked police vehicle" and "by willful disregard of the visual or audible signal so as to endanger or interfere with the operation of the police vehicle or other vehicles" (7; 40:23). To find Hanson guilty, the jury had to be satisfied beyond a reasonable doubt that:

- Hanson "operated a motor vehicle on a highway after receiving a visual or audible signal from a marked police vehicle"; and

- Hanson "knowingly fled or attempted to [elude] a traffic officer by willful disregard of the visual or audible signal so as to endanger other vehicles."

(40:25.) *See* Wis. JI-Criminal 2630 (2003).

The question on appeal for a sufficiency of the evidence claim is whether "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752

(1990). A court of appeals "may not" reverse a conviction for insufficient evidence unless this standard is met. *Id.*

The evidence of Hanson fleeing was clearly sufficient to convict him under Wis. Stat. § 346.04(3).

Several witnesses testified that Hanson operated a motor vehicle while Deputy Klinkhammer and Deputy Sturino had their emergency lights and sirens on. They included: Hanson; Deputy Eric Klinkhammer, who pulled Hanson over for speeding, pursued Hanson, and arrested Hanson; Randi Derby, an intern who was with Deputy Klinkhammer; Anthony Bowen, a citizen who was driving by and observed Hanson fleeing; and Deputy Samuel Sturino, who arrived as back-up while Hanson was fleeing and who helped arrest Hanson (39:56, 113, 118, 140, 153-54). The 911 recording also provided evidence that Hanson operated a motor vehicle "after receiving a visual or audio signal from a motor vehicle." It captured Hanson discussing his driving and requesting directions with the sound of sirens in the background (41:Ex. 6).

Several witnesses also testified that Hanson endangered other vehicles. Deputy Klinkhammer, Randi Derby, Anthony Bowen, and Deputy Sturino all testified that Deputy Sturino had to swerve to avoid being hit by Hanson on an exit ramp (39:57, 115-16, 137, 157-58). Deputy Klinkhammer testified that Hanson cut over from the center lane, narrowly missing another vehicle, by the exit ramp (39:8). Additionally, Randi Derby testified that Hanson maneuvered between two cars by the exit ramp and was on the left side of the median (39:113-14).

Hanson's testimony and the 911 recording provided direct evidence that Hanson knowingly fled from Deputy Klinkhammer: Hanson said in both that he was getting away from Deputy Klinkhammer (41:Ex.6). Additionally, the circumstances surrounding Hanson's fleeing provided circumstantial evidence of Hanson's intent. Hanson drove off fast while Deputy Klinkhammer had him stopped and after Deputy Klinkhammer told him he was under arrest

and tried to restrain him (39:54-55, 110, 132, 211). Hanson kept driving even though Deputy Klinkhammer and Deputy Sturino pursued him with their emergency lights and sirens on. Hanson argued at trial that he could not have been fleeing because he was driving to a police station. As explained above, however, that does not provide a basis for acquittal under Wis. Stat. § 346.04(3). *See* Argument I.C.

II. DISCRETIONARY REVERSAL IS NOT WARRANTED BECAUSE THE REAL CONTROVERSY IN THIS CASE WAS FULLY TRIED.

A. Introduction.

Hanson next claims that this court should reverse his convictions in the interest of justice because the real controversy was not fully tried (Brief 26-37). He sets forth five ways in which he alleges that the real controversy was not fully tried, only one of which he raises as an independent claim of error. He is not entitled to relief because he does not allege anything that could have kept the real controversy in his case from being fully tried. Moreover, contrary to what Hanson suggests with a few of his allegations, the fact that Hanson has alleged a lot of different grounds for reversal does not create a basis for reversal in its own right; the sum of Hanson's various allegations is no greater than its parts (*id.* at 35-36).

B. Relevant law.

This court has authority under Wis. Stat. § 752.35 to discretionarily reverse a conviction in the interest of justice "if it appears from the record that the real controversy has not been fully tried." *See Vollmer v. Lutey*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). It only exercises its authority "infrequently and judicially," *State v. Ray*, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App.

1992), and "in exceptional cases." *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

C. Hanson has not set forth a basis for discretionary reversal, and none is suggested by the record.

Basis One

The first basis Hanson gives for discretionary reversal is that the circuit court kept him from introducing character evidence that Deputy Klinkhammer had a reputation as being "confrontational, aggressive, and hot-tempered" (Brief at 27-30). Hanson claims that the circuit court erred in concluding that Deputy Klinkhammer was not a victim and that the character evidence would have been "very helpful to the jury as one of the main issues in the case was self-defense" (Brief at 29).

The state submits that the circuit court properly concluded that Deputy Klinkhammer was not a victim under Wis. Stat. § 904.04(1)(b) and that the restitution cases Hanson relies on do not mandate treating Deputy Klinkhammer as one (39:4-11, 95). It is unnecessary to delve into the merits of the underlying evidentiary claim, however, because the exclusion of the character evidence, even if in error, could not have kept the real controversy from being fully tried. Hanson was able to make his self-defense argument through other evidence—his own testimony that Deputy Klinkhammer screamed at him, ripped his shirt, brandished a baton and hit him on the head, and that he was scared for his life (39:206-15); the 911 recording in which he said that Deputy Klinkhammer beat him on the head, and he insisted on going to the police station (39:206-15; 41:Ex. 6); and the character witnesses who testified that he was a truthful, law-abiding person (39:191-202). This evidence was countered by Deputy Klinkhammer's testimony and by the testimony of Randi Derby and Anthony Bowen, all of whom disputed, among other things, that Deputy Klinkhammer hit Hanson

on the head. The evidence of Deputy Klinkhammer's character, presented through one defense witness who was not present for the incident-at-issue, would have added little to the mix of evidence about what actually happened.

Basis Two

The second basis Hanson gives for discretionary reversal is that the jury heard "so many individual bad acts committed against deputies, especially the murder of Deputy Fabiano" (Brief at 30-32). Deputy Klinkhammer testified about the harm that had befallen other officers three times. First, he said that another deputy was hit on the interstate and had to retire, when explaining that the interstate was dangerous and why he did not want Hanson to walk around it uncontrolled (39:44). Second, he said: "We've all seen the videos on *Cops* and *America's Videos* and all that of cops getting struck and killed because they don't approach on [the passenger's] side," when explaining why he approached Hanson's car from the passenger's side (39:49). Third, he said: "There's no routine traffic stop. Deputy Fabiano was killed by a guy with a gun," when cross-examined about his testimony that one of his concerns with Hanson being out of the car was that Hanson could have had a gun (39:65). In addition to Deputy Klinkhammer's references, the prosecutor alluded to Deputy Fabiano's death in his closing statement. When discussing why Deputy Klinkhammer was so concerned about Hanson's behavior, he explained that a traffic officer "doesn't know" whether a driver is under the influence of drugs or alcohol and "has a right to have control of this situation" (40:44). He then added: "It wasn't that long ago in this community where a routine traffic stop ended very, very tragically" (40:44).

Hanson argues that the "jury was entitled to decide this case on the facts of this case, not the tragedies befallen other officers" (Brief at 31). He fails to account for the fact that the circuit court properly exercised its discretion in allowing both the testimony and closing argument. *See State v. Doss*, 2008 WI 93, ¶ 19, 312 Wis.

2d 570, 754 N.W.2d 150 ("We will generally reverse a lower court's ruling related to the admission of evidence only upon a clear showing of erroneous use of discretion."); *State v. Cockrell*, 2007 WI App 217, ¶ 41, 306 Wis. 2d 52, 741 N.W.2d 267 ("[I]t is within the trial court's discretion to determine the propriety of counsel's statements and arguments to the jury."). The fact that Hanson was subject to the circuit court's reasonable discretionary determinations does not provide a basis for finding that the real controversy was not fully tried.

Even if the circuit court erred, however, discretionary reversal would not be warranted because the four references Hanson complains of would not have kept the real controversy from being fully tried. Deputy Klinkhammer's three general in-passing references were not the "repetitive . . . referral to specific, graphic injuries and murder of other officers" Hanson claims (Brief at 31). Deputy Klinkhammer's and the prosecutor's references all went to why Deputy Klinkhammer approached the traffic stop as he did and to a commonsense point the state was justified in making—that traffic stops are dangerous, particularly on interstates. If anything, the references may have supported Hanson's testimony that Deputy Klinkhammer screamed at him (39:206). The state did not compare Hanson to Deputy Fabiano's murderer, make the harms that have befallen other officers the focus of Hanson's trial, or somehow try to have Hanson pay the price for those harms. Hanson's trial remained about him and what he had done.

Basis Three

The third basis Hanson gives for discretionary reversal is that the jury "heard the 911 call unredacted" (Brief at 32-34). The 911 dispatcher was captured on the 911 recording telling Hanson that he was "breaking the law" and "putting people at risk" (41:Ex.6). Hanson argues that a cautionary instruction the circuit court gave regarding the 911 dispatcher's statements "allowed the jury to speculate that . . . the 911 dispatcher . . . had other

special knowledge outside the record that helped them reach their conclusion" (Brief at 33). He also asserts, based on the fact that the jury asked for the 911 recording to be replayed during deliberations, that the 911 dispatcher's statements "played a key role in the outcome of this case" (*id.* at 34).

The circuit court clearly instructed the jury, however, not to rely on the 911 dispatcher's statements. It instructed the jury before the 911 recording was played *both* at trial and during deliberations:

> Any comments made by the 911 operator in the recording regarding laws being broken are the operator's conclusions. It is for you, the jury, to decide based on the evidence presented in court and under the instructions the Court will give you at the end of the case whether or not the defendant endangered or interfered with the operation of another vehicle and whether or not the defendant violated any law.

(40:148-52.)

Jurors are presumed to follow instructions. *See State v. Adams*, 221 Wis. 2d 1, 11, 584 N.W.2d 695 (Ct. App. 1998). The cautionary instruction the circuit court gave jurors about the 911 dispatcher's statements did not leave any room for the type of speculation about which Hanson speculates, or, in turn, for concluding that the real controversy was not fully tried because the 911 recording was played in its entirety.

Basis Four A

The fourth basis Hanson gives for discretionary reversal is that the jury "heard inadmissible statements" about how the charges against him were increased from misdemeanor to felony charges (Brief at 35-36).

The information about the charging history came up during Hanson's testimony. In response to questions on cross-examination about why he did not save clothing he alleged was ruined when Deputy Klinkhammer grabbed

his shirt and when Deputy Klinkhammer and Deputy Sturino arrested him, Hanson said:

> I was very surprised every step of the way at how it's been treated. It was charged as a misdemeanor first. And then because I didn't take a deal, they charged a felony after threatening to do so if I didn't cop a deal to a misdemeanor, so I don't think that should be legal either.

(39:234.) The prosecutor followed up by engaging in a back-and-forth with Hanson, in which Hanson testified that what occurred was "legal extortion" and expressed disbelief that "an attorney's office can threaten to say if you don't take a misdemeanor deal, we're going to charge you with a felony" (39:235).

The circuit court gave a curative instruction regarding the information elicited about the charging history:

> During the testimony yesterday, you heard something to the effect that offers had been made to the defendant to resolve this case. Such offers are routine in criminal cases and should not be considered by you as evidence in this case in any way. Whether or not an offer was made or accepted is not relevant and has no bearing on your determination of the issues in this case. You should strike from your minds any reference to the contents of that testimony as it related to offers to resolve this case prior to trial and not consider it during your deliberations in any way. So if you have your notepads, and you won't have them with you now, but when you have your notepads, if there were notes made about that, those notes should be crossed off. That information is not to be considered in any way for any purpose by you during the deliberations or conclusion of this case.

(40:22.)

Hanson acknowledges that "[n]ormally, the limiting instruction would be the end of the discussion," but he asserts that the instruction here was inadequate due to its timing (Brief at 36). He speculates that, since the instruction was not given "until the next day" after his

testimony, "individual jurors might have implied that there was a justifiable reason for the charges to be increased" (*id.* at 35). There is no basis for Hanson's speculation. Hanson gives no reason, and none appears to exist, why the timing would affect the instruction's efficacy or undermine the presumption that jurors follow is. *See Adams*, 221 Wis. 2d at 11. Just as likely is that the instruction was more effective because jurors received it right before it really mattered, when they deliberated.

Basis Four B

A second ground Hanson gives as the fourth basis for discretionary reversal is that the jury "heard inadmissible statements" when the prosecutor read from Deputy Klinkhammer's police report during his rebuttal closing argument (40:64). Defense counsel read a portion of the police report during his closing argument that he had presented as impeachment evidence at trial, in which Deputy Klinkhammer wrote that Hanson drove the speed limit on the exit ramp (40:64). The prosecutor responded during his rebuttal argument by reading the sentence "immediately before" what defense counsel had read, which had not been presented at trial, in which Deputy Klinkhammer wrote that "'Hanson exited'" the interstate "narrowly missing another exiting vehicle" (40:81).

Hanson acknowledges that the prosecutor's reading back "[n]ormally . . . would not be a major problem" but claims that it is given the totality of other "problems" he alleges (Brief at 36). Hanson is correct that the prosecutor's reading of the line from Deputy Klinkhammer's police report was not a major problem on its own. It was one comment in the prosecutor's rebuttal argument. It involved information that Hanson endangered others while driving on the exit ramp about which, as discussed in Argument I.D., there was plenty of actual evidence (39:57, 87, 113-16, 137, 157-58). Additionally, any potential harm caused by the prosecutor's mention was mitigated by the fact that the circuit court instructed jurors both that closing statements

were not evidence and that they should not consider the prosecutor's quotation from Deputy Klinkhammer's report unless the statement was actually presented as evidence (40:31, 81). The jury, once again, is presumed to have followed instructions. *See Adams*, 221 Wis. 2d at 11. Hanson tries to piggyback this allegation off others. As explained elsewhere, however, Hanson does not allege anything else that kept the real controversy from being fully tried, and thus, cannot benefit from such piggybacking.

Basis Five

The fifth basis Hanson gives for discretionary reversal is that the jury was never asked to find that he was not intentionally fleeing because he was attempting to drive to the police station (Brief at 37). In fact, however, that was a theme of his defense. Defense counsel argued on opening: "He was not running or fleeing from the police. He was running to the police" (39:30-31). Defense counsel similarly argued in closing: "this is probably the first case where someone was going to the police and they're charged with fleeing. . . . Here we've got a guy who's calling and asking, 'Please tell me where the police station is.' Right off the bat, the State is behind the eight ball on this" (40:59-60). Defense counsel supported these arguments during the evidentiary portion by emphasizing the 911 recording, which indicated that Hanson was attempting to drive to the police station, and by eliciting testimony from Hanson about the fear he felt and why he decided to drive to the police station rather than remain with Deputy Klinkhammer (39:212-15; 41:Ex. 6).

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All in all, Hanson's case was relatively straightforward. There was no dispute that Hanson got out of his car when pulled over, that Deputy Klinkhammer repeatedly ordered him back into the car, that Hanson got out of the car a second time, that Deputy Klinkhammer tried to restrain Hanson and ripped his shirt, that Hanson

then got in his car and drove off, and that Hanson was eventually arrested after he pulled off the interstate. Hanson challenged whether he endangered safety while fleeing, argued that he fled in self-defense, claimed that he was trying to cooperate, and questioned whether he could be convicted of fleeing when driving to a police station. The state, in turn, presented evidence that Hanson disobeyed orders, fled, and endangered safety. It was up to the jury to decide which side to believe. Hanson has not pointed to anything that kept this jury from properly doing its job.

CONCLUSION

The state respectfully asks this court to affirm Hanson's judgment of conviction because there was sufficient evidence to convict him of fleeing a traffic officer under Wis. Stat. § 346.04(3) and because the real controversy in his case was fully tried.

Dated this 10th day of March, 2010.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in a proportional serif font. The brief contains 4,306 words.

_____

REBECCA RAPP ST. JOHN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of March, 2010.

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